Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03679/2015

THE IMMIGRATION ACTS

Heard at Manchester	**Decision and Reasons Promulgated**
On 1 September 2015	**On 15 September 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

AMOA

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Ms K Smith, instructed by GM Immigration Aid Unit
For the respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, AMOA, date of birth 9.12.70, is a citizen of Libya.

2. This is his appeal against the decision of First-tier Tribunal Judge Malik promulgated 8.6.15, dismissing his appeal against the decision of the Secretary of State to refuse his asylum, humanitarian protection and human rights claims. The Judge heard the appeal on 27.5.15.

3. First-tier Tribunal Judge Landes granted permission to appeal on 1.7.15.

4. Thus the matter came before me on 1.9.15 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Malik should be set aside.

6. In granting permission to appeal, Judge Landes found it arguable that the First-tier Tribunal Judge should have found the decision of the Secretary of State not in accordance with the law, having considered the position of the children on the basis that they had only been in the UK since 2013, rather than considering their overall length of residence and that although the appellant and her children returned to Libya in 2013, it was only temporarily and two of the children had lived in the UK for at least 7 years by the date of the decision.

7. Alternatively, Judge Landes found it arguable that the First-tier Tribunal Judge erred in refusing to adjourn for a social worker's report. Whilst the judge was right to observe at §10 that she was empowered to consider the best interests of the children, given the statutory guidance that the children should be consulted and their wishes and feelings of the children should have been taken into account, "it is arguable that the judge was not sufficiently equipped to conduct a best interests assessment without information as to the children's views (see in particular [30] and [39] of **MK (section 55 – Tribunal options) Sierra Leone** [2015] UKUT 223)." When applying for an adjournment a few days before the hearing, the representatives had indicated that as they had not been able to secure funding for a social work report they had arranged for a social worker to take statements from the children so their views could be expressed, but it appears this had not been done by the day of the hearing. As it happens, so I am now informed, funding was granted on the day of the hearing but the representatives were not aware of this.

8. Judge Landes did not restrict the grounds to be argued, but observed that the ground averring that the judge erred by not adjourning to await an expert country report had less force, given that at the date of the hearing no funding was available and there was no indication that a report might be available at a later date.

9. The Rule 24 response, dated 17.7.15, submits that the judge made sustainable findings that were properly open to her on the evidence. "The respondent will submit that the grounds advanced by the appellant fail to disclose material arguable errors of law that would be considered capable of having a material impact upon the outcome of the appeal." It is submitted that although the judge found three of the children had lived in the UK in excess of 7 years and correctly directed herself as to the eligibility requirements of E-LTRPT 2.2 and that EX1 was engaged, the judge made reasonable findings properly open on the evidence that it would nevertheless not be unreasonable to expect the children to leave the UK. "Despite accepting that the three children, having lived in the UK over 7 years will have developed educational, social and cultural connections outside of school and that their removal from the UK will break such ties and indeed despite the FTJ fully appreciating that the children would prefer to live in the UK it was nevertheless properly open to the FTJ to conclude that notwithstanding these findings this is not a case where it would be unreasonable to expect the appellant's children to leave the UK, nor that they

would encounter very significant obstacles to their integration in Libya. The respondent will submit that the FTJ provided adequate reasons to support (her) findings at paragraphs 29-30 of the Determination."

10. "As regards relevance of section 55 of the best interests of the child, it was properly open to the FTJ to conclude that the respondent's decision does not constitute a disproportionate breach of article 8 ECHR on private or family life grounds and the FTJ provides adequate sustainable reasons to support (her) findings that the decision of the respondent is in accordance with the law. [Paragraph 33 determination.] The appellants grounds are advanced in mere disagreement with the negative outcome of the appeal and do not disclose any material arguable error of law."

11. Before reaching my decision on error of law, I have carefully considered the decisions of MK and JO and others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC), relied on by Ms Smith.

12. There are four children. The eldest two were born in Libya in 2001 and 2005 and are now 10 and 14 years of age. Another child was born in 2008 and is now 7 years of age. The youngest was born in 2013 and is now two years of age.

13. MK held that the burden is on the appellant to demonstrate on the balance of probabilities that there has been a breach of section 55 by the Secretary of State. Further, even if there is such a breach, it is clear that it remains open to the Tribunal not to remit the decision, provided the Tribunal is satisfied that it is itself sufficiently equipped to make an adequate assessment of the best interests of any affected child. That, in my view, is what the First-tier Tribunal Judge was entitled to and did do.

14. It is clear that the judge proceeded on the basis that the children would wish to remain in the UK as a family unit.

15. I note that the refusal decision was made on 12.2.15 and thus the appellant had over 3 months to obtain and provide such evidence as he wanted the Tribunal to consider.

16. It was open to the appellant and her representatives to have statements or even letters taken from the children to express their views. Ms Smith was unable to explain why that was not done, particularly when they knew that their application for adjournment made prior to the hearing date had been refused. I also note that the appellant's own witness statement, dated 26.5.15, does not address the best interests issue at all. She could have given a further witness statement to address this issue.

17. There is, even now, very little documentary evidence about the children, just two letters from the schools of the older two children. It is difficult in such circumstances, where the appellant has adduced so little evidence as to the best interests of the children, to demonstrate that the Secretary of State is in breach of section 55. The appellant has failed to demonstrate what best interests were not adequately considered either by the Secretary of State or the Tribunal judge.

18. In ZH (Tanzania) [2011] UKSC 4, Baroness Hale opined at §82 that the "court will have to consider whether there are any special features requiring further investigation of the children's interests, but in most cases it should be able to proceed

with what it has." In MK it was held that a Tribunal should have regard to its adjournment and case management powers, together with the overriding objective. "They will also take into account the facilities available to the Secretary of State under the statutory guidance, the desirability of finality and the undesirability of undue delay." The Guidance also provides that "children should be consulted and the wishes and feelings of children taken into account whenever practicable when decisions affecting them are made."

19. As stated in Zoumbas v SSHD [2013] 1 WLR 3690, it is important to have a clear idea of a child's circumstances, and what is in a child's best interests before considering whether the force of other considerations outweighs those interests. There is no substitute for a careful examination of all relevant factors when the interests of a child are involved.

20. However, on the facts of this case I find that the appellant has failed to demonstrate that failure on the part of the Secretary of State to conduct interviews with the children gives rise to any breach of section 55. In JO, the Tribunal concluded that the issue did not arise because the existence of the children had been disclosed and evidence relating to them was included with the application. However, at §36 of MK the Tribunal reflected on the realities of the various scenario of any appeal where the duties imposed by section 55 had not been performed by the Secretary of State, which includes where it appears to the Tribunal that the information and representations advanced on the appellant's behalf "invited further enquiries or elucidation or evidence gathering of this kind on the part of the Secretary of State." In this case, the appellant appears to have adduced no such evidence, or even submissions, so as to give rise to a duty to invite further submissions or evidence. It is not for the Secretary of State to be the primary fact finder or investigator in such circumstances.

21. Considering the way in which the judge addressed the best interests of the children, primarily from §29 onwards, it can be seen that the judge accepted that the three elder children would have developed educational, social and cultural ties. Despite the distinct lack of evidence on the issue, the judge made the not unreasonable assumption that the children will have made friends and become accustomed to the UK, and that removal would break such ties, and that they would prefer to remain in the UK. There was no evidence that they would not be able to continue education in Libya. In fact, when they returned in 2013 the appellant enrolled the three elder children in school.

22. On the facts of this case, I am not satisfied that it was necessary to obtain an expert social worker report to determine the wishes of the children. Ms Smith has failed to identify any particular concerns or issues in respect of these children, or that their best interests would not be obvious from the general background and history of the appellant, or any features or factors which would or could have produced any different outcome to the conclusion of the judge as to the best interests of the children. I am satisfied that the First-tier Tribunal Judge conducted a careful examination of all relevant information and factors. As JO held, the question whether the section 55 duties have been duly performed in any given case will invariably be

an intensely fact sensitive and contextual one. "in the real world of litigation, the tools available to the court or Tribunal considering this question will frequently be confined to the application or submission made to the Secretary of Sate and the ultimate letter of decision."

23. In the circumstances, and for the reasons set out herein, I do not accept that the decision of the Secretary of State was not in accordance with the law. I fail to understand what in particular the Secretary of State should have taken into account that was not considered and which would have made any material difference. I find no error of law in the judge's deciding to continue with the hearing and to make her own assessment of the best interests of the children, rather than adjourning, when it was far from clear that financing for an expert social work report was available. Further, it is far from clear what an expert social work report could have added to the assessment conducted by the judge. Ms Smith suggests that a report could have assessed the issue of the fear of the children. That is mere speculation, but even now there is no evidence to discharge the burden of proof that there are any considerations that could or should have been taken into account, but were not. The finding that the best interests of the children were to return to Libya with their parents is fully reasoned and supported on the evidence and the circumstances of this case.

24. I find no error of law in the ground suggesting that the judge should have adjourned for a country expert report. Again, I fail to see how this could have provided any material assistance to the appellant or her family members. Her asylum account was rejected in its entirety. The judge found both the account of the appellant's daughter being kidnapped and of his wife having links to the former Gaddafi regime was incredible. At §28 the judge considered the submission that there had been a deterioration in Libya since AT & others (Article 15c; risk categories) Libya CG [2014] UKUT 318 (IAC) was decided. The appellant did not fall into any of the risk categories and in fact returned to Libya on two post-revolution occasions, accompanied by his wife and children. They returned to and exited Libya in 2013 without experiencing any difficulties, leading the judge to conclude that, contrary to the appellant's account, the family is of no adverse interest to the current regime in Libya. Nevertheless, the judge also took into account the background country material referenced in the Secretary of State's refusal decision, and that material in the appellant's bundle, including those passages highlighted by the appellant's representative. I find it was open to the judge to conclude that there was no adequate reason to depart from the relatively recent country guidance case.

25. In the circumstances, I find no error of law in the alleged failure of the judge to adjourn for country expert evidence. Once again, the appellant had had ample time to gather and present such country background evidence as he wanted and there was no evidence that funding would be available for such an expert report.

Conclusions:

26. For the reasons set out herein, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed on all grounds.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did make an order.

Given the circumstances that children are involved, I continue the anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup

Dated